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Before the
LIBRARY OF CONGRESS
United States Copyright Office
Copyright Arbitration Royalty Panel
Washington, D.C. 20024

GENERAL COUNSEL
OF COPYRIGHT

JUN 12 1998

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In the Matter of)

ADJUSTMENT OF RATES FOR)
NONCOMMERCIAL EDUCATIONAL)
BROADCASTING COMPULSORY LICENSE)

Docket No. 96-6 CARP NCBRA

MOTION OF THE AMERICAN SOCIETY
OF COMPOSERS, AUTHORS AND PUBLISHERS TO STRIKE
CERTAIN PORTIONS OF PUBLIC BROADCASTERS' PROPOSED
REPLY FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Dated: June 12, 1998

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On May 7, 1998 the record in this proceeding was closed pursuant to 37 C.F.R.

§ 251.52(a). Notwithstanding that fact, Public Broadcasters have attempted thereafter to supplement the record with substantive documentary evidence which they failed to proffer while the record was still open. On June 8, 1998 ASCAP made a motion to strike Appendix A to PB's Findings and Conclusions and each of the findings putatively based on that misleading extra-record evidence.¹ Public Broadcasters filed opposition papers to that motion on June 10; ASCAP is filing its reply with the filing of this motion today.

This motion concerns Public Broadcasters' Post-Hearing Reply Proposed Findings of Fact and Conclusions of Law ("PB's Reply" or "PB RFF"). In PB's Reply, Public

¹ Capitalized terms not otherwise defined herein shall have the meaning set forth in ASCAP's Proposed Findings of Fact and Conclusions of Law filed with the Office on May 29, 1998 ("ASCAP FF") and ASCAP's Reply Findings of Fact and Conclusions of Law filed with the Office on June 8, 1998 ("ASCAP RFF").

Broadcasters have again attempted to fortify their case with an extra-record "Appendix A" ("Reply Appendix A"). In that Appendix, Public Broadcasters present, without any sponsoring witness and without leave of the Panel, an entirely new fee-generating formula. As explained in paragraphs 117, 188, 121, 122 and 129 of PB's Reply (which ASCAP also now seeks to strike), the formula attempts to generate "reasonable fees" by trending forward the fee set forth in the 1978 CRT Decision to account for certain changes which Public Broadcasters perceive to have occurred over time. Public Broadcasters then request that "if any version of a trending formula is to be considered by the Panel, which we set forth in Appendix A is plainly the more probative of a reasonable fee." PB RFF ¶ 122. Since this "trending formula" and analysis were never before presented to the CARP, there is no way for ASCAP to question Public Broadcasters' analysis other than by reopening the record and allowing ASCAP to cross-examine the person or persons who prepared the analysis or to provide rebuttal materials or testimony.

I.

In the absence of such a result, Reply Appendix A and its supporting paragraphs should be stricken from the record. They are offered as substantive evidence after the record has closed. They are offered without a sponsoring witness or compliance with any of the CARP Rules on statistical evidence. As noted in ASCAP's reply papers to its June 8, 1998 motion to strike, "there has to be a time when there is a cutoff." See also In re 1996 Satellite Carrier Royalty Rate Adjustment Proceeding, Docket No. 96-3 CARP-SRA (July 18, 1997) (panel rejected satellite carriers' supplemental mathematical formula included in their findings because it had not been previously sponsored by a witness).

Even were the Panel to overlook the foregoing, its admission into the record is prejudicial to ASCAP. Because Reply Appendix A was offered without any sponsoring witness and without any disclosure as to its underlying assumptions, ASCAP has had no opportunity to challenge its admissibility or its substance. Public Broadcasters' specious explanation for their obviously dilatory submission is that it is offered in "rebuttal" to certain arithmetic observations set forth in ASCAP's Findings and Conclusions.

In that regard, at ASCAP FF ¶¶ 255, 256, ASCAP presented two sets of calculations to the Panel relating to the 1978 fee:

(1) ASCAP observed that if the 1978 fee was adjusted to reflect the growth in the Stations' "private" revenues over time and certain assumed changes in the Stations' music use practices over time (both of which were the subject of testimony in the record), the resulting "trended" ASCAP fee for 1995 was approximately \$8,225,000 annually. ASCAP FF ¶ 266. This observation was testified to by Dr. Boyle in his written direct testimony filed in October 1997. ASCAP Boyle Dir. 11. Public Broadcasters' counsel thereafter cross-examined Dr. Boyle on this issue during his oral testimony before the Panel. Tr. 1884 (Rich). For whatever reasons of their own, Public Broadcasters elected not to challenge these observations during the rebuttal phase of this proceeding.

(2) At ASCAP FF ¶ 265, ASCAP also observed that if the 1978 fee was adjusted to account for inflation and then divided by the increase in the number of Stations during the period 1978-1997, the adjusted 1978 fee would amount to approximately \$7,024 per Station. ASCAP's fee proposal in this proceeding is similar, amounting to approximately \$7,535 per Station. ASCAP also observed that the effect of inflation over the past twenty years is such that, even if ASCAP received all of the \$4,000,000 total

annual fee proposed by Public Broadcasters (and BMI received none of that fee), the amount so received by ASCAP would in constant dollars only be one half of the fee awarded in 1978 on a per Station basis (i.e., \$4,000,000/1,052 Stations). ASCAP FF ¶ 265.

Neither of the foregoing observations by ASCAP were offered as a ratemaking methodology. Rather, ASCAP offered them to corroborate the conclusion that its proposed fees are within the zone of reasonableness and that Public Broadcasters' proposed fees are not. Public Broadcasters have neither challenged the accuracy of the observations in ASCAP FF ¶¶ 255 or 256, nor have they sought to strike them from the record. Instead, they have sought to violate the CARP Rules by offering a last-minute, last-ditch alternate ratemaking methodology. It is clearly too late for that.

Given the foregoing, the Panel should strike Reply Appendix A and PB RFF ¶¶ 117, 118, 121, 122, and 129 from the record.

II.

Were the Panel, contrary to the CARP Rules, to refrain from striking these materials from the record, ASCAP should be given an opportunity to controvert both the accuracy of the materials so belatedly proffered and to cross-examine a sponsoring witness who could support those materials. Given such an opportunity, ASCAP's counsel is confident that the following substantive flaws, among others, would be revealed to the Panel:

- In their formula, Public Broadcasters argue for fee reductions to account for both an alleged 33% drop in their own music use since 1978 and an alleged drop of up to 59% in the ASCAP music use of commercial broadcasters over the same period. As a factual matter, neither statistic is remotely accurate based upon the record evidence. Even so, in discounting for both alleged drops, Public Broadcasters engage in a classic "double dip." Any change in effective license rates already reflects changes in a particular user's music use over time. There is no rational basis for discounting fees to account for music use changes in both user groups.

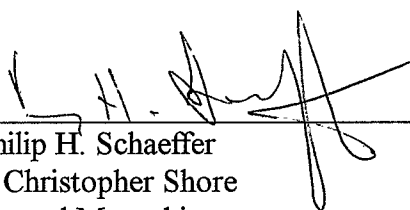
- In attempting to adjust for music use changes over time, Public Broadcasters rely on “music share” data from PB Ex. 27X and BMI FF ¶¶ 158-160. Leaving aside the serious deficiencies in data from both sources, music share data is meaningless without reference to how much music is actually used. For example, a 90% share of ten minutes of feature music per hour is still less overall music use than a 60% share of 25 minutes of feature music per hour.
- Even if the Panel were to look at alleged changes in ASCAP’s music share over time, Public Broadcasters cite no data on ASCAP’s share of music use on the Public Radio Stations. Public Broadcasters have not explained why data as to television broadcasts, which account for just a third of total broadcast time, should serve as a proxy for actual radio broadcast data.
- Without revealing what they are doing, Public Broadcasters mix data from different sources and from different years in an attempt to make their formula appear negative to ASCAP’s position. For example, they create a 1995 “effective rate” for commercial television and radio licenses by comparing 1995 license receipts with 1996 revenues. They also compare data measured in “features per hour” to data measured in “minutes per hour,” without any explanation as to how the data are comparable.
- In addition to the foregoing, at several other points in Reply Appendix A it is clear that Public Broadcasters are manipulating the data to reach their desired result. For example, in comparing the “effective rates” for ASCAP’s commercial radio licensees in 1978 and 1995, they use conservative government data on revenues for 1976 and data from a private source (Kagan Associates) for revenues for 1996. This “sleight of hand” makes it appear that ASCAP’s effective rate has dropped by 19% since 1976. However, if one compares the effective rates by referring (as one should) to government data for both 1976 and 1995, the commercial effective rate has increased by 3% from 1978.

CONCLUSION

ASCAP’s motion to strike Reply Appendix A and its supporting paragraphs should be granted in all respects. If the Panel believes it appropriate, a briefing schedule should be proposed on an expedited basis.

Dated: New York, N.Y.
June 12, 1998

Respectfully submitted,



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CERTIFICATE OF SERVICE

I am an associate at White & Case. On June 12, 1998, I caused to be served by hand or courier express/same day delivery true copies of the Motion of the American Society of Composers, Authors and Publishers to Strike Certain Portions of the Public Broadcasters' Proposed Reply Findings of Fact and Conclusions of Law on the following;

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Dated: New York, New York
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Samuel Mosenkis, Esq.

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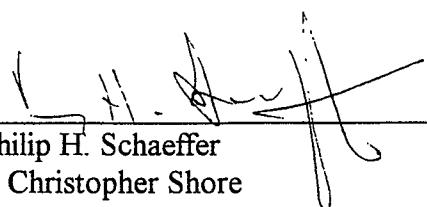
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CONCLUSION

ASCAP’s motion to strike Reply Appendix A and its supporting paragraphs should be granted in all respects. If the Panel believes it appropriate, a briefing schedule should be proposed on an expedited basis.

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Respectfully submitted,



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